# Guardian Royal Exchange Assurance (M) Bhd v National Union of Commercial Workers & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–37–1999
FAIZA TAMBY CHIK J
11 OCTOBER 1999

***Labour Law*** *— Industrial Court — Award — Application for certiorari — Whether court have jurisdiction to render interpretation to a collective agreement — Whether court committed a serious error of law vitiating the award — Whether application for interpretation of collective agreement should be made under Industrial Relations Act 1967 s 56 — Industrial Relations Act 1967 s 56*

The applicant — a member of the Association of Insurance Employers — and the first respondent were parties to a collective agreement. Article 13(b)(i) of the collective agreement provided, inter alia, 'if an employee is referred to a specialist by one of the company's doctors, the specialist's fees will be paid by the company'. The applicant was informed by their panel doctor that an employee had requested the doctor to refer her to a specialist at Assunta Hospital for specialist treatment. The applicant had a discussion with the employee where the employee was informed that she was only entitled to consult an orthopaedic surgeon at the government hospital as her case was not urgent. Further, the employee was informed that if she chose to consult a specialist from Assunta Hospital the applicant would only pay the medical fees at the government hospital rate. The employee agreed. The employee consulted the specialist at Assunta Hospital and was required to pay not only consultation fees but other charges totalling RM1,839.65. However, the applicant paid the sum of RM1,326.65 in accordance with government hospital rates. The first respondent contended that there had been non compliance of the collective agreement because the whole sum of RM1,839.65 had not been paid and lodged a complaint for non compliance of art 13(b)(i) of the collective agreement under s 56 of the Industrial Relations Act 1967 ('the Act'). At the hearing before the Industrial Court, the applicant denied any non compliance and raised, inter alia, the following issues: (i) before the Industrial Court could determine whether there was any non compliance of art 13(b)(i), the court had to first interpret the true meaning and scope of the provision; (ii) on its express wording, art 13(b)(i) only required the applicant to pay consultation fees; and (iii) the dispute between the parties was a 'trade dispute' within the meaning of s 26 of the Act and a complaint of non compliance was unsuitable for adjudication of the dispute. The Industrial Court rejected these contentions and held, inter alia, that: (i) the Industrial Court could in a complaint for non compliance under s 56 of the Act render an interpretation on the article in question; and (ii) all payments incurred in connection with the specialist treatment must be borne by the applicant. The applicant made an application for an order of certiorari to quash the Industrial Court's award.

**Held**, allowing the application: A

(1) The Industrial Court had no jurisdiction to render an interpretation of a term of a collective agreement when the application before it was not one for interpretation but for non compliance. The function of the Industrial Court under s 33 (an application for interpretation), s 26 (a trade dispute reference) B and s 56 (a non compliance complaint), are distinct and the Industrial Court has no jurisdiction to intermingle its function under those sections (see p 510F–G).

(2) The issue raised was a question of substantive importance, i.e. as to the scope and extent of art 13(b)(i) of the collective agreement. This was accordingly unsuitable for adjudication as a non C compliance complaint. The Industrial Court failed to apply the correct test in law in determining its powers under s 56 of the Act when a question of interpretation of the collective agreement arose. Therefore the Industrial Court committed a serious error of law which vitiated the entire award; *Dragon & Phoenix Bhd v* D *Kesatuan Pekerja-Pekerja Perusahaan Membuat Texstil & Pakaian Pulau Pinang & Anor* [1991] 1 MLJ 89, *Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306 followed (see pp 511G–H, 513E–F).

(3) It was incorrect for the Industrial Court to state that the 'non-urgent cases' being paid a government hospital rates was not E permissible under the collective agreement because this was not specifically covered in the collective agreement. By so holding the Industrial Court read into the express provisions of the collective agreement limitations which did not exist and hence acted in clear error of law (see p 514E–F).

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(4) The Industrial Court should have declined to hear the application under s 56 of the Act and held it could only deal with the matter as a trade dispute so that it could properly determine the question of the financial implication of the award of the industry. The financial implication of the award on the industry concerned is one of the specific statutory factors the Industrial Court must G consider under s 30A(4) of the Industrial Relations Act 1967 (see p 515G–H).

(5) The Industrial Court acted in error of law in failing to give effect to the express wording of the collective agreement. Even if the Industrial Court had the jurisdiction to render an interpretation of H the disputed article, it acted in error of law and in excess of jurisdiction when it created new obligations on the applicant which were neither specified nor expressed in the collective agreement (see p 516E–F).

(6) If art 13(b)(i) is taken on its own, it was clear that the applicant was only liable for the specialist's fees. However, the Industrial I Court enlarged this express obligation by construing that the applicant was also liable for all sums payable in respect of the

A specialist treatment. This was in clear violation of the express wording of art 13 (see p 517G).

**[Bahasa Malaysia summary**

B Pemohon tersebut — seorang ahli Pertubuhan Insurans Majikan — dan responden adalah pihak-pihak kepada perjanjian kolektif. Perkara 13(b)(i) perjanjian kolektif tersebut memperuntukkan, antara lain, 'jika seorang pekerja dirujuk kepada seorang pakar oleh salah seorang doktor syarikat, yuran pakar tersebut akan dibayar oleh syarikat'. C Pemohon telah diberitahu oleh panel doktor mereka bahawa seorang pekerja telah meminta doktor tersebut untuk merujuknya kepada seorang pakar di Hospital Assunta untuk rawatan pakar. Pemohon telah berbincang dengan pekerja tersebut di mana pekerja tersebut telah diberitahu bahawa beliau hanya berhak untuk meminta nasihat pakar bedah ortopedik di hospital kerajaan oleh kerana kesnya D bukanlah mustahak. Selanjutnya, pekerja tersebut telah diberitahu bahawa jika beliau memilih untuk mendapatkan nasihat seorang pakar dari Hospital Assunta pemohon hanya berhak membayar yuran perubatan di atas kadar hospital kerajaan. Pekerja tersebut telah bersetuju. Pekerja tersebut telah mendapatkan nasihat pakar di Hospital Assunta dan diperlukan untuk membayar bukan sahaja E yuran pakar runding tetapi juga bayaran yang lain berjumlah RM1,839.65. Namun pemohon tersebut telah membayar jumlah RM1,326.65 menurut kadar hospital kerajaan. Responden pertama menegaskan bahawa terdapat ketidakpatuhan perjanjian kolektif tersebut oleh kerana keseluruhan jumlah RM1,839.65 tidak dibayar F dan membuat aduan untuk ketidakpatuhan perkara 13(b)(i) perjanjian kolektif di bawah s 56 Akta Mahkamah Perusahaan 1967 ('Akta tersebut'). Semasa perbicaraan di hadapan Mahkamah Perusahaan, pemohon telah menafikan sebarang ketidakpatuhan dan membangkitkan, antara lain, isu-isu berikut: (i) sebelum Mahkamah Perusahaan boleh menentukan sama ada terdapat ketidakpatuhan G perkara 13(b)(i), mahkamah perlu menafsirkan maksud sebenar dan skop peruntukan tersebut; (ii) di atas perkataan nyata, perkara 13(b)(i) hanya memerlukan pemohon untuk membayar yuran pakar runding; (iii) pertikaian tersebut antara pihak-pihak adalah 'pertikaian tred' di dalam maksud s 26 Akta tersebut dan suatu aduan H ketidakpatuhan adalah tidak sesuai untuk pemutusan pertikaian tersebut. Mahkamah Perusahaan telah menolak penegasan sedemikian dan memutuskan, antara lain, bahawa: (i) Mahkamah Perusahaan boleh di dalam aduan ketidakpatuhan di bawah s 56 Akta tersebut memberikan penafsiran ('artikel') perkara yang dipersoalkan; dan (ii) semua pembayaran-pembayaran yang dikenakan berkaitan I dengan rawatan pakar mestilah ditanggung oleh pemohon. Pemohon telah membuat suatu permohonan untuk suatu perintah untuk membatalkan award Mahkamah Perusahaan.

**Diputuskan**, membenarkan permohonan tersebut:

(1) Mahkamah Perusahaan tiada bidang kuasa untuk menjadikan suatu penafsiran terma perjanjian kolektif apabila permohonan di hadapannya bukanlah mengenai penafsiran tetapi ketidakpatuhan. Fungsi Mahkamah Perusahaan di bawah s 33 (suatu permohonan untuk penafsiran), s 26 (suatu rujukan pertikaian tred) dan s 56 (suatu aduan ketidakpatuhan), adalah berbeza dan Mahkamah Perusahaan tiada bidang kuasa untuk mencampuradukkan fungsinya di bawah seksyen-seksyen tersebut (lihat ms 510F–G).

(2) Isu yang dibangkitkan adalah suatu persoalan kepentingan substantif, iaitu berkenaan dengan skop dan had perkara 13(b)(i) perjanjian kolektif. Dengan itu ini adalah tidak sesuai untuk penghakiman sebagai aduan ketidakpatuhan. Mahkamah Perusahaan telah gagal untuk memakai ujian yang sebenar dari segi undang-undang di dalam menentukan kuasanya di bawah s 56 Akta tersebut apabila persoalan penafsiran perjanjian kolektif bangkit. Oleh itu, Mahkamah Perusahaan telah melakukan kesilapan undang-undang yang serius yang membatalkan keseluruhan award; *Dragon & Phoenix Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Texstil & Pakaian Pulau Pinang & Anor* [1991] 1 MLJ 89, *Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306 diikut (lihat ms 511G–H, 513E–F).

(3) Ia adalah tidak betul bagi Mahkamah Perusahaan untuk menyatakan 'kes-kes yang tidak mustahak' dibayar kadar hospital kerajaan adalah tidak dibenarkan di bawah perjanjian kolektif tetapi ini tidak diliputi secara spesifik oleh perjanjian kolektif. Dengan memutuskan sedemikian Mahkamah Perusahaan telah membaca ke dalam peruntukan-peruntukan nyata perjanjian kolektif had-had yang tidak wujud dan dengan itu telah melakukan kesilapan undang-undang yang jelas (lihat ms 514E–F).

(4) Mahkamah Perusahaan sepatutnya tidak mendengar permohonan tersebut di bawah s 56 Akta tersebut dan memutuskan ia hanya dapat mengendalikan perkara tersebut sebagai pertikaian tred agar ia dapat menentukan dengan betul persoalan implikasi kewangan award industri tersebut. Implikasi kewangan award tersebut ke atas industri yang berkaitan adalah bersangkutan dengan faktor-faktor statutori yang spesifik yang Mahkamah Perusahaan mestilah pertimbangkan di bawah s 30A(4) Akta Mahkamah Perusahaan 1967 (lihat ms 515G–H).

(5) Mahkamah Perusahaan telah bertindak secara menyalahi undang-undang kerana gagal untuk memberi kesan kepada perkataan nyata perjanjian kolektif. Walaupun Mahkamah Perusahaan mempunyai bidang kuasa untuk memberikan suatu penafsiran perkara ('artikel') yang dipertikaikan, ia telah bertindak menyalahi undang-undang dan melampaui bidang

kuasanya apabila ia mewujudkan kewajipan-kewajipan yang baru ke atas pemohon yang tidak ditentukan atau dinyatakan di dalam perjanjian kolektif (lihat ms 516E–F).

(6) Jika perkara 13(b)(i) dibaca bersendiriran, ia adalah jelas bahawa pemohon hanya bertanggungan untuk yuran pakar. Namun, Mahkamah Perusahaan telah membenarkan kewajipan nyata ini dengan menafsirkan bahawa pemohon adalah bertanggungan untuk semua jumlah-jumlah yang kena dibayar berkenaan dengan rawatan pakar. Ini adalah pelanggaran jelas perkataan nyata di perkara 13 (lihat ms 517G).]

## Notes

For cases on award of industrial court, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1029–1052.

## Cases referred to

*Delhi Cloth Mills Co Ltd v Its Workmen* (1969) 2 LLJ 755 (refd)

*Dragon & Phoenix Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Texstil & Pakaian Pulau Pinang & Anor* [1991] 1 MLJ 89 (folld)

*Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor* [1987] 2 MLJ 81 (refd)

*Goh & Dom Enterprise Sdn Bhd v Union of Employees of Port Ancillary Services Supplier P Klang* [1978] 1 ILR 338 (refd)

*Harrison Malaysian Plantations Bhd v National Union of Commercial Workers* [1984] ILR 287 (refd)

*Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306 (folld)

*Hotel Jaya Puri Bhd v National Union of Hotel, Bar and Restaurant Workers & Anor* [1980] 1 MLJ 109 (refd)

*Kesatuan Pekerja-Pekerja Perkayuan v Syarikat Jengka Sdn Bhd* [1996] 1 MLJ 464 (refd)

*Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 (refd)

*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (refd)

*Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 (refd)

## Legislation referred to

Industrial Relations Act 1967 ss 26(2), 30(4), (5), 30A(4), 33, 52(2), 56

Rules of the High Court 1980 O 53

*R Abraham* (*Shook Lin & Bok*) for the applicant.

*A Murugavell* (*Murugavell Arumugam & Co*) for the respondents.

**Faiza Tamby Chik J**: This is an application for an order of certiorari to quash the Industrial Court Award No 64 of 1999 pursuant to the provisions of O 53 of the Rules of the High Court 1980 ('the RHC'). The applicant's motion is supported by the statement setting out the grounds on which the applicant relies and is also supported by the affidavit of Mohd Alawi bin Abd Aziz affirmed on 7 May 1999.

The material facts giving rise to the application may be summarized as follows: The applicant, as a member of the Association of Insurance Employers and the first respondent union, are parties to a collective agreement (Exh 'AA—1' — p 22 of encl 8 ('the said collective agreement')). Article 13(b)(1) of the said collective agreement reads as follows:

> Employees shall receive, at the Company's expense, medical treatment by the Company's doctor and medicine inclusive of specialized drugs prescribed by the Company's Doctor or if having regard to the nature or circumstances of the illness the services of the Company Doctor are not obtainable within a reasonable time or distance by any other registered medical practitioner or by a medical officer and the employee shall be reimbursed as per receipted bills. In addition, if an employee is referred to a specialist by one of the Company's Doctors, the specialist's fees will be paid by the Company.

By a letter dated 9 January 1998, one of the applicant's panel doctors, one Dr Tengku Zarina, of Drs Catterall Khoo, Raja Malek dan Rakan-Rakan, informed the applicant that one of the applicant's employees, one Norgayah bte Yusoff ('the employee') had requested the doctor to refer the employee to a specialist at Assunta Hospital for specialist treatment. This letter is important as it is the basis of the dispute between the parties and may be found at p 63 of encl 8 ('the said letter'). It would be noted from the said letter that the panel doctor under the column 'General Remarks, if any' proceeded to state: 'She does require a second opinion from an orthopaedic surgeon but she has requested the above doctor. It is of a non-urgent matter.' Equally important to note is that the said letter is divided into three sections, ie ss (a), (b) and (c), followed by the General Remarks Section. Sections (a) and (b) specifically deal with the situation where the doctor recommends specialist treatment. These two sections, it would be noted, were not utilized by the panel doctor in the instant case. Instead, the panel doctor utilized section (c) which section deals with the situation where an employee requests for referral for specialist treatment. In the instant case, ss (a) and (b) of the said letter were not applicable because there was no referral by the panel doctor for the employee to see a specialist. It was merely a request by the employee to be referred to a specialist. This is an important distinction because art 3(b) of the collective agreement specifically refers to the situation where an employee is referred to a specialist by one of the company's doctors. The applicant had a discussion with the employee where the employee was informed that she was only entitled to consult an orthopaedic surgeon at the government hospital as her case was not urgent. Further, the employee was informed if she chose to consult a specialist from Assunta Hospital that the applicant would only pay the medical fees at the government hospital rate. The employee agreed. The employee consulted the specialist at Assunta Hospital and was required to

A pay not only consultation fees but other charges such as X-ray, medicines, physio, magnetic imaging and corset all totalling RM1,839.65. The applicant, however, paid the sum of RM1,326.65 in accordance with government hospital rates.

B The first respondent union, however, contended that there had been non compliance of the collective agreement because the whole sum of RM1,839.65 had not been paid and lodged a complaint for non compliance of art 13(b)(i) of the collective agreement under s 56 of the Industrial Relations Act 1967 ('the Act'). At the hearing before the Industrial Court, the applicant denied any non compliance and raised, inter alia, the following issues:

C

(i) that before the Industrial Court could determine whether there was any non compliance of art 13(b)(i), the court had to first interpret the true meaning and scope of the provision;

D (ii) that, on its express wording, art 13(b)(i) only required the applicant to pay consultation fees although, as a practice, other expenses were met;

E (iii) that fees within the meaning of art 13(b)(i) refers to charge or payment for professional advice or service and did not, therefore, include expenses for medicine and other services. This was to be contrasted with other collective agreements which make provision for payment of both the cost of medicine and treatment;

(iv) that the dispute between the parties was a 'trade dispute' within the meaning of s 26 of the Act and a complaint of non compliance was unsuitable for adjudication of the dispute.

F The Industrial Court rejected these contentions and held, inter alia, as follows:

G (i) that the Industrial Court could, in a complaint for non compliance under s 56 of the Act, render an interpretation on the article in question (citing the decision of *Syarikat Kenderaan Melayu Kelantan v Transport Workers Union* [1995] 2 MLJ 341);

H (ii) in proceeding to interpret art 13(b)(i), the Industrial Court held that all payments incurred in connection with the specialist treatment must be bone by the applicant based not only on the wording of the article but because it was 'not fair' if expenses were limited to consultation fees only (citing the decision on interpretation of collective agreements in *Kesatuan Pekerja-Pekerja Perkayuan v Syarikat Jengka Sdn Bhd* [1996] 1 MLJ 464);

(iii) that it was immaterial who made the choice to refer to the specialist, whether it was the panel doctor or the employee herself;

I (iv) that the applicant could not determine the government rates could apply in a non-urgent case as it was not provided for in the collective agreement;

(v) that, in accordance with 'equity and good conscience' under s 30(5) of the Act, the applicant must pay all expenses incurred in this particular case, and hence ordered compliance.

It is well established that an order of certiorari will lie where the tribunal whose decision is sought to be impugned commits the following errors of law:

(i) where the decision-maker misconceives the terms of any relevant statute or misapplies or mistakes a principle of general law;

(ii) where the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations.

The criteria were set out in the Court of Appeal decision of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317.

I am of the opinion that the Industrial Court committed several errors of law in its award and therefore I so held in that firstly, the Industrial Court had no jurisdiction to render an interpretation of a term of a collective agreement when the application before it was not one for interpretation but for alleged non compliance. Secondly, the Industrial Court should have declined to hear the non compliance application because the dispute between the parties was a 'trade dispute' within the meaning of s 26 of the Industrial Relations Act 1967. Thirdly, even if the Industrial Court had the power to proceed to interpret the award, it acted in error by failing to take into account the express wording of the collective agreement and by failing to consider adequately the undisputed evidence before it that there was no 'reference' to a specialist within the meaning of art 13(b)(i) of the collective agreement and also by failing to take into account relevant considerations.

The Industrial Court had no jurisdiction to render an interpretation of a term of a collective agreement when the application before it was not one for interpretation but for non compliance. The function of the second respondent (ie the Industrial Court) under s 33 of the Act (an application for interpretation), s 26 of the Act (a trade dispute reference) and s 56 of the Act (a non compliance complaint), are 'distinct' and the Industrial Court 'has not jurisdiction to intermingle its function under those sections'. In the instant case, the Industrial Court did precisely what it should not have done in law, i.e. it proceeded to render an interpretation on the relevant article in dispute in the collective agreement on a non compliance complaint. The decision is, accordingly, bad in law and should be quashed. The first respondent has attempted to raise an argument relating to the provisions of the Act that the Industrial Court can, when dealing with matters 'brought to its notice', invoke wide powers and, in particular, pursuant to s 52(2) of the Act. However, this argument must be rejected for the following reasons:

(i) Section 52(2) of the Act has no application when an issue of interpretation of a collective agreement arises as in the instant case. If such an interpretation issue arises, then it must be considered solely

A within the context of the provisions of s 33 of the Act. Both the Supreme Court and Federal Court in Federal Court decision of *Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306 and *Dragon & Phoenix Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Texstil & Pakaian Pulau Pinang & Anor* [1991] 1 MLJ 89 have emphasized that any B interpretation exercise must be carried out under s 33 and not under any other section.

(ii) The decision of *Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor* [1987] 2 MLJ 81 cited by the first respondent is not applicable because no question of interpretation arose in that C case.

(iii) Further, the Supreme Court in *Dunlop* was concerned with the powers exercisable under a non compliance complaint and concluded that in accordance with s 52(2) of the Act, the powers exercisable by the Industrial Court under a non compliance complaint would be similar D to those vested in a trade dispute (save the powers under ss 26(2) and 30(4) of the Act).

(iv) It is equally important to note that in *Dunlop*, the Supreme Court accepted that if the dispute did not involve a simple breach of the provisions of the collective agreement but substantive questions E involving retrenchment, then s 56 of the Act would be inappropriate. The following passage in the judgment of Abdoolcader SCJ at p 83 F–H is relevant:

> First, the appellant is not challenging the right of the respondent to retrench its employees but is only complaining of its failure to give the requisite advance notice provided for in cl 42(a). If the complaint were of the breach of F the provisions of any of the other paragraphs of cl 42 of the collective agreement or if any dispute were to arise as to their implementation or application, the position would be entirely different as then there would clearly be a trade dispute within the connotation thereof in the definition of that term in s 2 since they relate to principles affecting redundancy or retrenchment as such.

G (v) In the instant case, the issue raised was a question of substantive importance, ie as to the scope and extent of art 13(1)(b) of the collective agreement. This was accordingly unsuitable for adjudication as a non compliance complaint.

(vi) The first respondent has also, with respect, misunderstood the H applicant's arguments pertaining to s 30(4) of the Act as set out in para 4.4 of the first respondent's submission. This section requires the Industrial Court to take account, inter alia, the 'financial impact of an Award on the Industry'. The applicant submits that the Industrial Court should have recognized that in the present case, in making its ruling, there would be a financial impact on not only the applicant but I also the other insurance companies party to the collective agreement and, hence, should have immediately declined to hear the application under s 56 of the Act. However, by rendering its Award, the Industrial

> Court has effectively made a ruling affecting all the other parties to the collective agreement. This is clearly outside its jurisdiction both under ss 52(2) and 56 relied on by the first respondent.

In the result, none of the contentions and authorities raised by the first respondent in his submission can assist the first respondent in view of the clear and binding authority of the Federal Court and Supreme Court in the *Holiday Inn* and *Dragon & Phoenix* cases respectively. The first respondent agrees that those authorities are good law. And it is observed that the Industrial Court failed to refer to them.

In the instant case the Industrial Court failed to apply the correct test in law in determining its powers under s 56 of the Act when a question of interpretation of the collective agreement arose. This test is set out in the Federal Court decision of *Holiday Inn* and at p 312 Seah SCJ said:

> In my judgment, under s 56 of the Act the Industrial Court is charged with the enforcement of an award or collective agreement which has been taken cognizance of by the court after a complaint has been received alleging non compliance with one or more terms of the award or said collective agreement. On the authority of *Federal Hotel Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers* [1983] 1 MLJ 175, the Industrial Court is not charged with the duty of interpreting or adjudicating the term or terms of an award or collective agreement which are disputed by the contracting parties concerned. Section 33 provides for this and the legislature has laid down certain procedures to be followed when a complaint is made pursuant to this section. The function of the Industrial Court under s 33 can only be exercised on a definite application made for that purpose (see the *Federal Hotel* case). In other words, any question of interpretation or adjudication of a term of an award or collective agreement is not within the scope of s 56.

These observations as to the limited and restricted role of the Industrial Court when exercising its powers under s 56 of the Industrial Relations Act 1967 were similarly set out in the subsequent Supreme Court decision of *Dragon & Phoenix* and at p 90 Harun Hashim SCJ said:

> In a complaint of non compliance with any term of a collective agreement or award under s 56 of the Industrial Relations Act 1967, the Industrial Court should, as a general rule, look at the terms of the contract by confining itself to within the four walls of the collective agreement or award and decide whether the term has or has not been complied with. It is a purely enforcement function. It should not embark on an expedition to examine the provisions of the Employment Act 1955 in order to determine the meaning of the term complained of unless there is a specific reference to it because to do so would invoke the interpretative function of the court under s 33 of the Industrial Relations Act 1967 which is an entirely different exercise from that under s 56. It is important to recognize the difference between these two functions of the court because failure to comply with an order under s 56 is an offence with penal provisions whereas there are no such consequences in respect of a matter dealt with under s 33. It is also important to separate the two functions in order to determine which particular jurisdiction the Industrial Court is exercising in any particular case. It may well be that in a dispute such as in the present case there should have been two separate applications to the court, the first under s 33 to invite the court to exercise its interpretative function and if there is still non compliance, a second application for enforcement under s 56.

> A In the instant case, the matter came before the Industrial Court is a complaint of non compliance with the first award under s 56 but the resulting second award is in substance an interpretative exercise with a detailed discussion on s 60A of the Employment Act 1955. It is clear therefore that the real issue before the Industrial Court was on the interpretation of art 26(4) of the award read with art 14. It follows that the union ought not to have made B a complaint under s 56 alleging non compliance when its interpretation of the terms of the first award was disputed by the company. It should have applied to the court under s 33 for interpretation. We accordingly find that there is a jurisdictional error on the face of the record and the learned judge ought to have issued certiorari to quash the award.

C Both these cases were referred to and summarized by the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 at p 351:

> The effect of the majority judgment in *Holiday Inn* and the decision in *Dragon & Phoenix* may be summarized thus:
>
> D (i) where an employer and his workmen are in dispute over the meaning of the terms of an award or collective agreement, resort should be had to s 33(1) and not to s 56(1) of the Act; and
>
> (ii) if, in the event of such dispute as aforesaid, resort is had to s 56(1), the court has no jurisdiction to offer an elaborate interpretation of the terms of the award or agreement in question and direct compliance of the E interpreted version. If it does so, it exceeds its jurisdiction.

In the result, I am of the view that the Industrial Court failed to apply the correct tests set out by the Federal Court and Supreme Court in *Holiday Inn* and *Dragon & Phoenix* respectively and therefore the Industrial Court committed a serious error of law which vitiated the entire award. It is F observed that there was clearly a substantial dispute between the applicant and first respondent on the scope of art 13(b)(i) and whether the article could properly apply to the facts giving rise to the complaint of non compliance. Such a dispute required an 'elaborate' interpretation of the article which was outside the jurisdiction of the Industrial Court in a non compliance complaint. In essence, the ambiguity which arose under art 13 G was whether an employee could select a specialist of his or her own choice and thereby render the applicant employer liable for all expenses thereby incurred when, on its express wording, art 13(b)(i) reads otherwise and is as follows:

> H In addition, if an employee is referred to a specialist by one of the Company's Doctors, the specialist fees will be paid by the Company.

The principal difficulty in this case was that the employee in question was not referred by the applicant's panel doctor to consult a specialist at a particular hospital, ie Assunta Hospital but merely advised to 'seek a second opinion' and was also informed that as the complaint was 'non urgent' that I the employee's case could be referred to a government hospital. The first respondent union, however, contended that according to their interpretation of art 13(b)(i), any form of referral to a specialist by a panel doctor would result in the applicant paying not only specialist A treatment but all other costs and expenses incurred. Given the divergent interpretation in the wording of art 13(b)(i) of the collective agreement by both parties, the Industrial Court should have immediately declined to hear the complaint of non compliance and its failure to do so was an error of law which vitiated the award. In particular, the Industrial Court exceeded its enforcement powers under s 56 of the Act by proceeding to both adjudicate B and interpret the issues in dispute between the parties in contravention of the tests laid down by the Federal Court and Supreme Court referred to earlier.

The wording of art 13(1)(b) does not support the first respondent's contention that it is immaterial whether the specialist was chosen by the C employee or the panel doctor. Article 13(1)(b) specifically refers to the situation where an employee is referred to a specialist by a company doctor. It is implicit in the wording of art 13(1)(b) that it must refer specifically to situations where the panel doctor refers an employee to a specialist and not where it is on the request of the employee. The rationale is important. The company would only be prepared to pay specialist fees when such treatment D was recommended by the panel doctor and not for any request by the employee himself. To do so would negate the whole purpose of the precondition of specific referral by the panel doctor. Indeed, if the first respondent's contention is correct, then any request by the employee for specialist treatment must be borne by the applicant employer irrespective of E whether the panel doctor is of the view that it is warranted or not.

With regard to the 'non-urgent cases' being paid a government hospital rates, it must be noted that this is not specifically covered in the collective agreement and, hence, it was incorrect for the Industrial Court to state this was not permissible under the collective agreement. By so holding, the Industrial Court, in fact, read into the express provisions of the F collective agreement limitations which did not exist and, hence, acted in clear error of law. The Industrial Court also wrongly misconstrued the word 'in addition' to include all expenses when the express wording of cl 13(1)(b) was that if specialist treatment was required, the company would only pay for 'fees'. It is clear that the Industrial Court embarked on a construction G exercise which it was not permitted to do under s 56 and, in doing so, fell into further error in enlarging the clear and express obligations of the parties without basis.

The Industrial Court acted in error of law and in excess of jurisdiction when it failed to consider that the first respondent's complaint was, in H effect, a trade dispute within the meaning of s 26 of the Act and where the financial impact of the Industrial Court's decision on the industry as a whole would be a relevant consideration. If there is a trade dispute on the same subject matter as a non compliance action, the Industrial Court is obliged to stay or strike out the non compliance action and proceed with the trade dispute action first. This principle is well established and may be I illustrated by reference to the following Industrial Court awards.

In *Goh & Dom Enterprise Sdn Bhd. v Union of Employees of Port Ancillary*

A *Services Supplier P Klang* [1978] 1 ILR 338 at p 339, the court observed as follows:

> 3 As has been decided in *Harrison Malaysian Plantations Bhd. v National Union of Commercial Workers, Award* No 36 of 1984, [1984] ILR 287, and many other decisions of the court, a trade dispute can only be referred to this court under s 26 of the Act. A dispute can sometimes fall under both B s 26 and s 56. If that ever happens, parties must realize it can only come to this court if the Minister decides to refer the matter here. If we proceed to hear the case under s 56 of the Act, we would be encroaching upon the functions of the Director-General of Industrial Relations and usurping the powers of the Minister.
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> C 4 If the Union wishes to try two bites at the cherry, the company must not allow the union to do so. There should have been a preliminary objection made by the company before the union started its submission. The court should make a ruling on the preliminary objection. We find that the matter before us is a trade dispute and we strike out the application. It is now for the Minister to refer the matter to the court for hearing if he considers that there are merits in the case.

D In *Harrison Malaysian Plantations Bhd v National Union of Commercial Workers* [1984] ILR 287 at p 288, the court was of the view that:

> 5 Section 56 of the Industrial Relations Act 1967 (the Act) is of limited application only, that is to say, in a complaint of non compliance such as E in the instant case, there should be no dispute that the person complaining or on whose behalf the union is making the complaint, is an employee of the company. The approach should be 'I am entitled to payment, but I have not been paid.' It is then a question of fact whether the person is entitled to payment and if so whether payment has been made. This is because s 56 of the Act is the mechanism designed for the F implementation of collective agreements and it can only be invoked by the trade union or person bound by the agreement (s 17(2) of the Act). Article 2(2) of the agreement provides —
>
> > 'This Agreement shall be the only binding force in regard to the terms and conditions of employment for all employees of the Company except those excluded in cl 2(1) above.'

G In the instant case, the Industrial Court should have recognized that making a ruling on the dispute would have an impact not only on the applicant, but the other insurance companies who are also parties to the collective agreement and, hence, would have a financial impact on the industry. In this regard, the Industrial Court should have declined to hear the H application under s 56 of the Act and held it could only deal with the matter as a trade dispute so that it could properly determine the question of the financial implication of the award on the industry. The financial implication of the award on the industry concerned is one of the specific statutory factors the Industrial Court must consider under s 30A(4) of the Industrial Relations Act 1967 (see the case of *Kesatuan Pekerja-Pekerja Perusahaan* I *Dunlop Malaysia v DMIB Bhd* [1998] 1 MLJ 279, a case which concerned a 'trade dispute' under s 26 of the Industrial Relations Act 1967 where the court said:

The last contention is that the Industrial Court did not take the policy and purpose of the Act into account and its provisions under s 30(4), (5) and (6) when making the award. I must say that there is no substance in the contention. The learned chairman of the Industrial Court did in fact take into account all the matters raised under this ground when he said at p 209 of the award:

> 'The court in making its award in respect of a trade dispute is required by s 30 of the Industrial Relations Act 1967 to have regard to the public interest, the financial implication and the effect of the award on the economy of the country and on the industry concerned and also on the probable effect in related or similar industries and shall act according to equity and good conscience and the substantial merits of the case without regard to technicalities and legal forms.'

He continued at p 210:

> 'Therefore, the court having considered the requirement of s 30(4) of the Act in particular the public interest, the financial implications and the good effect the award would probably have on the economy of the country and the industry concerned and the court recognizing the substantial merits of the company's proposal as required by s 30(5) of the Act, awards that the company be allowed to implement the Rota Work System.'

In the face of the clear award of the Industrial Court, with respect, I agree with the submission of learned counsel for the company that the last contention of the union is utterly frivolous and indeed, unfounded.

The Industrial Court acted in error of law in failing to give effect to the express wording of the collective agreement. Even if the Industrial Court had the jurisdiction to render an interpretation of the disputed article, it acted in error of law and in excess of jurisdiction when, in purporting to interpret the terms of art 13(b)(i) of the collective agreement, created new obligations on the applicant which were neither specified nor expressed in the collective agreement in, inter alia, the following respects:

(i) By rendering the applicant, employer fully liable for all fees, costs and expenses charged by a medical specialist selected by employees themselves (it would be noted art 13(b)(b)(i) specifically refers to 'specialist fees' only).

(ii) By imposing upon the applicant employer the full costs of treatment by such specialists irrespective of the actual recommendation by the applicant's panel doctor and irrespective of the proper rates to be charged in respect of such treatment.

If the Industrial Court had the jurisdiction to attempt to interpret the collective agreement in the present case, it failed to apply the correct test in determining the scope of art 13(b)(i) of the award.

In particular, the reliance on the decision in *Kesatuan Pekerja-Pekerja Perkayuan v Syarikat Jengka Sdn Bhd* [1996] 3 MLJ 464 (at p 8 of the award) is misplaced because in that case the issue was the duration of a collective agreement which was to be gathered from the overall tenor of the documents as opposed to the instant case which required a specific determination of a particular clause and the specific wording therein. In that case, the Court of Appeal referred to the Indian High Court decision of *Delhi Cloth Mills Co Ltd v Its Workmen* (1969) 2 LLJ 755 where the following passages in the judgment at pp 767–768 was quoted:

>> ...
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>>> "But in the branch of law relating to industrial relations, the temptation to be crusaders instead of adjudicators must be firmly resisted. It would not be out of place to remember the statement of the law made in a different context but nonetheless appropriate here — by Douglas J of the Supreme Court of the United States in *United Steel Workers of America v Enterprise Wheel & Car Corp* (1960) 363 US 593] '...as arbitrator... does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the awards."
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>> 'We may at once state that we are not for a moment suggesting that the law of industrial relations developed in our country has proceeded on lines parallel to the direction of the law in the United States.'
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>> 'We may repeat that in matters relating to the grant of gratuity and even generally in the settlement of disputes arising out of industrial relations, there are no fixed principles, on the application of which the problems arising before the tribunals or the courts may be determined; and often precedents of cases determined ad hoc are utilized to build claims or to resist them. It would, in the circumstances, be futile to attempt to reduce the grounds of the decisions given by the industrial tribunals, the Labour Appellate Tribunal and the High Courts to the dimensions of any recognized principle.'
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> It is with these matters in mind that we approach the inquiry whether the Industrial Court placed an erroneous interpretation on the first award and the collective agreement.

In this regard, the Industrial Court failed to give effect to the express wording of the article but instead sought to effectively enlarge the scope of the applicant's obligations. If art 13(b)(i) is taken on its own, it is clear that the applicant is only liable for the specialist fees. However, the Industrial Court enlarged this express obligation by construing that the applicant was also liable for all sums payable in respect of the specialist treatment. This was in clear violation of the express wording of art 13. The Industrial Court cannot seek to enlarge or create rights and obligations which have been expressly provided for in a collective agreement unless there is a legal basis for doing so. Otherwise, the whole purpose of the collective agreement providing definite and specified terms and conditions upon which both parties can act would be rendered nugatory. In *Hotel Jaya Puri Bhd v National Union of Hotel, Bar and Restaurant Workers & Anor* [1980] 1 MLJ 109, Salleh Abas FJ (as he then was) stated at pp 112–113 as follows with regard to the Industrial Court's powers to 'create' rights and obligations:

> The next point which I have to consider is the basis how and why the President gave an award of compensation of two months' salary and fixed allowances against the hotel. I tried to find the basis why compensation is paid at all. If there is a legal basis for paying the compensation, the question of amount of course is very much a matter of the discretion which the Industrial Court is fully empowered under s 30 of the Industrial Relations Act to fix, but where there is no legal basis for the payment of compensation, I do not think that the President can create legal right and obligation for it and, in my view, the award will be clearly an error in law for which I am prepared to allow this application.

In the result, in the instant case, the Industrial Court acted in error in misconstruing the scope of art 13(b)(i).

The Industrial Court acted in error of law and in excess of jurisdiction in failing to properly construe the undisputed facts pertaining to the first respondent's complaint and, in particular:

(i) that there was no 'reference' by the applicant's panel doctor to a specialist within the express wording of art 13(b)(i) of the collective agreement;

(ii) that the employee herself had requested for a specialist of her choice and had agreed that if she sought treatment from such a specialist (ie Assunta Hospital) that the applicant would only pay the government hospital rates;

(iii) there was no evidence of any 'practice' whereby the applicant was required to pay all expenses including medicine and equipment which is contrary to the specific wording of art 13(b)(i) of the collective agreement which specifically excluded payment for medical, surgical or other appliances.

In the instant case, it was not disputed that the first respondent requested the applicant's panel doctor to refer her to her own specialist at Assunta Hospital. Therefore, there was no 'reference' within the meaning of art 13(b)(i) of the collective agreement. This can be clearly seen in the letter from the applicant's panel doctor to the applicant dated 9 January 1998 as alluded to earlier. Since the first respondent's request was not within the scope of art 13(b)(i) of the collective agreement, the applicant was entitled to reimburse the first respondent at government hospital rates in respect of the specialist fee only. Further, the Industrial Court had acted upon an incorrect basis in fact when it found that there was such practice whereby the applicant is obliged to pay all the expenses and not restricted to specialist fee only. This finding is contrary to the express wording of art 13(1)(b)(i) which specifically excludes expenses for medical, surgical and other appliances.

In *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204, at p 206, the Supreme Court cited the case of *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 where Lord Wilberforce said that an official exercising a discretionary power commits a jurisdictional error if she or he acts upon an incorrect basis of fact. In this regard, I am of the view that the Industrial Court has acted in error of law and in excess of jurisdiction when it rendered its award on what was clearly an incorrect basis of fact.

The Industrial Court acted in error of law and in excess of jurisdiction when it failed to take into account relevant considerations to wit, evidence produced by the applicant before the Industrial Court which established that in cases where employees were referred to a specialist by a panel doctor in accordance with art 13(b)(i) of the collective agreement, the applicant would always issue a letter to the specialist confirming that the applicant would meet the costs of the treatment to be incurred which was not the case in the present instance.

In the proceedings before the Industrial Court, the applicant established that it was the applicant's practice to issue a letter to the specialist confirming that the applicant would pay the costs of the medical treatment. However, in the instant case, there was no such letter or letter to that effect and this was not disputed by the first respondent. The Industrial Court has failed to take into consideration the above fact in making the award and therefore the decision is liable to be set aside. In this connection, the Supreme Court in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* at p 207 stated:

> In *Ashbridge Investment Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, Lord Denning MR said (at p 1326) in the context of a challenge to the Minister's confirmation of a compulsory purchase order:
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> > 'The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law. It is identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law.'

The decision of the Industrial Court was one no similarly circumstanced tribunal would reach and the decision was accordingly unreasonable in law.

In *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor*, the Supreme Court observed a decision of a tribunal may be challenged on judicial review where the effect of the decision was one which no similarly circumstanced tribunal would reach so as to render the same 'manifestly unreasonable'. At p 206, Abdoolcader SCJ said:

> The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly. I should perhaps pause here to refer to my judgment in this regard in *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124 where in dealing with the question of unreasonableness I alluded (at pp 129–130) to Lord Diplock's exegesis in *Bromley London Borough Council v*

> *Greater London Council & Anor* [1983] 1 AC 768 at p 821 in regard to decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them, and it would not perhaps be amiss to refer in this context to Dunn LJ's assertion in *Reg v Secretary of State for the Home Department, ex p Asif Mahmood Khan* [1984] 1 WLR 1337 at p 1352 that 'the categories of unreasonableness are not closed …' Mason J said in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd.* [1986] 66 ALR 299 at p 310 that it might be possible to challenge a decision which has:
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>> '… failed to give adequate weight to a relevant factor of greater importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations (or the taking into account of irrelevant considerations), but that the decision is 'manifestly unreasonable' … (A) court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits.'

In this instance, the award of the Industrial Court is manifestly unreasonable in the above sense as there were various errors of law as set out above. In the premises, the award cannot be sustained and is accordingly quashed. An order in terms of the application is hereby entered.

*Application allowed.*

Reported by Jafisah Jaafar